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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 765

RICHARD J. HOPKINS, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court holding the affidavits of bias and prejudice to be insufficient (R. 28–46) is not reported. The judgment of the circuit court of appeals directing petitioner to proceed no further in the trial of cases where affidavits had been filed (R. 49) was entered without opinion.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered December 15,

1942 (R. 49). The petition for a writ of certiorari was filed on February 25, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the affidavits of bias and prejudice filed by government counsel against petitioner complied with the requirements of Section 21 of the Judicial Code.

2. Whether the Government's petition in the circuit court of appeals presented facts warranting the issuance of a writ of mandamus.

STATUTE INVOLVED

Section 21 of the Judicial Code (28 U. S. C. 25) is quoted in full in the Argument, *infra*, p. 8.

STATEMENT

During the past three years the United States has condemned a vast quantity of land in Kansas for defense and war purposes (R. 29, 47–48). In determining just compensation for this land the Government follows the practice and procedure prescribed by the laws of Kansas. Act of August 1, 1888, sec. 2, 25 Stat. 357 (40 U. S. C. 258). Under Kansas practice value is first determined by three appraisers, appointed by the court, who "view and appraise" the property. Kan. Gen. Stat. Ann. (Corrick, 1935) sec. 26–101. From their awards either party has an absolute

right to a trial *de novo* before a jury. (*Ibid.*, sec. 26–102.)

Since a trial *de novo* is certain to follow if either party is dissatisfied, it has become the general practice of both the Government and the landowners in Kansas, and in many other states where trials *de novo* are a matter of rigth, to pay little heed to the proceedings of the commissioners or appraisers and concentrating on the trial before a jury, thus avoiding the expense of two complete trials.[1] And experience derived by Department of Justice officials from the condemnation of vast quantities of land during the past ten years has shown that as a rule verdicts returned by juries are lower than those returned by courts or commissioners.

Accordingly, it has been the Government's practice in Kansas, whenever the appraisers' awards are greatly in excess of the estimates made by the acquiring officer (Act of February 26, 1931, sec. 1, 46 Stat. 1421, 40 U. S. C. 258a), to ask for a valuation trial before a jury. Petitioner has strenuously opposed this policy, using considerable pressure to induce government counsel to accept the appraisers' awards (even though unsatisfactory to the acquiring agency and even though arrived at

[1] In fact, the Department of Justice is at present sponsoring legislation eliminating commissioners, appraisers, and assessors in federal condemnation proceedings and providing for a single trial before a court or jury, in order to expedite payment for land acquired during the war period. See H. Rep. 2289, 77th Cong., 2d sess., pp. 1–3.

without submission of any evidence). And where, over his opposition, the Government has insisted on its right to a trial *de novo,* petitioner has endeavored to "badger" counsel into dispensing with juries (see R. 7).[2] The Department of Justice, pursuant to its general policy and believing that petitioner has an exaggerated concept of the value of Kansas real estate, has insisted on jury trials, with the result that its field attorneys handling condemnation matters in Kansas have become *persona non grata.* Believing that petitioner was determined to "convince" the Government of the inadvisability of insisting on jury trials, the special attorneys for the Lands Division of the Department were instructed to file affidavits of bias and prejudice in cases about to be tried before him (R. 46–A.)

Affidavits were accordingly filed on October 30, 1942, in four suits (Civil Nos. 1233, 1243, 1246, and 1262) then pending in petitioner's court and scheduled for trial on November 9. In these

[2] Petitioner advances patriotic motives in support of his opposition to jury trials, contending that jurymen were needed on the farms (R. 29–30). But the trials in question were to be held in the latter part of October and in November, a slack period in a grain-belt area like Kansas. Since there is only one federal district judge for the entire state of Kansas, there would only be one federal jury sitting at any one time in that state. And it is the general practice in federal condemnation proceedings to use the same jury to evaluate the different parcels involved in a particular taking. Hence, it does not appear that the Government's insistence upon a jury trial will seriously interfere with farming operations in the State of Kansas.

affidavits the following facts and reasons were alleged in support of the belief that petitioner was biased and prejudiced: that he had attempted to coerce the Government into abandoning its policy of jury trials in condemnation cases, to the point of refusing to proceed with jury cases (R. 6–7); that he had accused the Department of Justice of "unfair tactics" in insisting upon an admitted right to a jury trial (R. 7); that he had characterized jury trials as "an unwarranted expense of money" (R. 7–9), although well knowing that the awards of court appraisers had been sizeably reduced by juries in companion cases, such reductions redounding to the benefit of the general taxpaying public (R. 9); that he had accused "some departments of the Government" (including the Justice and War Departments which were actively engaged in acquiring the lands in question for war purposes) of not knowing that a war is going on (R. 7, 8); that he had charged government counsel with trying to cover up facts with regard to land values (R. 9–10), a charge which the latter categorically denied (R. 10); that he had called government counsel a "pettifogger" (R. 10); that he had frustrated an attempt by the Government to show that a "quotient verdict" had been returned in a particular case by adjourning court and surreptitiously questioning members of the jury in chambers out of the presence of a court reporter and government counsel (R. 10–11); that he favored Kansas

property owners rather than the general taxpaying public in all valuation matters (see R. 7, 12–13, 15–16).

Nothwithstanding the mandatory language of Congress that upon the filing of an affidavit stating the facts and reason for the belief of personal bias and prejudice, "such judge shall proceed no further" (28 U. S. C. 25), petitioner examined the affidavits at length (R. 28–46) and on November 9, 1942, declined to recuse himself (R. 46). Since petitioner notified counsel that he proposed to proceed with the trial of these cases on Monday, November 16, the Government applied to the circuit court of appeals for a writ of mandamus or, in the alternative, for a writ of prohibition commanding petitioner to proceed no further (R. 1). In support of its petition, the Government pointed out that a great number of condemnation cases were pending in Kansas, involving large amounts of money and numerous landowners; that if these cases were tried before petitioner and the affidavits of bias and prejudice were subsequently sustained on appeal, the retrial of all cases heard in the interim would result in a multiplicity of appeals and a needless expenditure of time and money (R. 3–4).

Circuit Judge Bratton on Sunday, November 15, 1942, entered an order granting the Government leave to file a petition for mandamus and ordered the district judge to show cause why the writ should not be granted (R. 1–2). When the

matter came on for hearing before the circuit court of appeals on November 20, petitioner moved to dismiss the Government's petition on various grounds (R. 18–19). The court below denied the motion but allowed him fifteen days in which to file a "response" (R. 19). The matter came on for further hearing on December 15, 1942, at which time the Government introduced affidavits in support of its petition and in refutation of certain charges that the proceedings in question had not been authorized by the Attorney General (R. 46A–48). The court thereupon entered judgment granting the Government a writ of mandamus (R. 49). All three judges agreed that the affidavits were legally sufficient under the statute, Judge Phillips dissenting on the sole ground that the facts and circumstances did not warrant the granting of this remedy (R. 49).

ARGUMENT

Petitioner makes two primary contentions: (1) that the affidavits of bias and prejudice were legally insufficient (Pet. 8–12); and (2) that the facts stated in the petition for mandamus did not justify the issuance of the writ (Pet. 8, 12).

1. The disqualification of a federal judge for personal bias or prejudice and the substitution of another judge in his place is governed by section 21 of the Judicial Code (Act of March 3, 1911, 36 Stat. 1090, 28 U. S. C. 25) which provides:

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> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, or chosen in the manner prescribed in section 27 of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

The scope and purpose of this provision may best be determined by examining its legislative history. It was inserted during the debates on the Judicial Code of 1911 after Representative

Cullop of Indiana, its author, had expressed the belief on the floor of the House that Section 20, providing for the disqualification of judges for interest or relationship, was too narrow, that it should be broadened to include other grounds, and that the matter of qualification or disqualification should not be left to the judge himself for determination (46 Cong. Rec. 306):

> *When a charge is made against the qualification of any judge that he is biased, that he is taking sides one way or the other, that question ought not to be left to him to be passed upon.* Judges are heirs to the same frailties that other men are, and they ought not to be required to pass upon and decide questions personal to themselves, and as a delicate question they ought not to want to pass upon such a question as that. But by law it should be taken away from them and the venue of the cause changed. *It should be made mandatory on this question.* I am going to ask the chairman for permission for a section to be added to section 20, or an amendment be added thereto, so that a party upon assigning a specific reason for a change of a judge in the trial of the cause the same *shall be changed.* * * * It is just as sacred that litigants should have a fair trial in court as it is for a judge to preside at the trial and conduct the business of the courts, and the litigant ought to have the opportunity to have his case tried before a court that he *believes* to be fair and impartial. It is un-

fair to litigants to be compelled to come at any time before a court where they think they cannot have a fair trial. It is a reproach to the administration of justice to require them to do so. It is for this reason that I want to offer an amendment to this section, that either party to a suit, other than one brought by the Government,[3] may file his affidavit stating the cause for which he desires a change of venue. Many of the States have this practice, and it is found to be a wholesome one. Litigants as a rule do not want to delay the courts; but courts had better be delayed, and the disposition of the business in them had better be delayed, than to require any man to submit his case to a court for trial before a judge in whom he has not full confidence in his fairness and impartiality. * * * the party asking a change of venue, presenting a cause provided for by statute, ought to be permitted by the law to have a change of venue, and the judge ought to be required by the law to give it when it is asked. I am going to ask permission to add an amendment defining the causes and conditions under which a change of venue shall be granted, and so as to bring that question before the House I am going to ask unanimous consent to have time in which to prepare a provision covering that subject and present it to the House. I can conceive no

[3] As is explained *infra*, p. 19, Section 21 as finally enacted contained no such limitation.

> greater wrong imposed upon a citizen, however high or humble, than to compel him to submit his cause, an important matter to him, to a court in which he fears justice will not be administered to him. I can conceive of no greater imposition upon any court than to require it to sit, hear, and decide a cause in which it is aware the party litigants have not absolute confidence in his ability or qualification to dispose of it fairly. [Italics supplied.]

As a result of this discussion, Representative Cullop succeeded in persuading the House Judiciary Committee to approve an additional Section (sec. 20a), the language being substantially that of the present Section 21. 46 Cong. Rec. 2626. In the ensuing debates on the floor of the House, the purpose and scope of this new provision were explained by Mr. Cullop, its sponsor, as follows (46 Cong. Rec. 2626–2627):

> Mr. CULLOP. * * * The section that is proposed as section 20a provides that, on the litigant filing the proper affidavit stating the fact that the judge is biased or prejudiced in the case, he shall proceed no further and another judge shall be called under the provisions of the act, as provided in other cases, who shall hear and determine the case. The affidavit shall state the reasons for the belief that the applicant has for the bias or prejudice of the judge. * * *

Mr. Cox of Indiana. I am partly in favor of the gentleman's amendment, but does he believe that his amendment will accomplish what he is driving at? In other words, *if the amendment is adopted, does the gentleman believe that it will leave it discretionary with the court?*

Mr. CULLOP. *No; it provides that the judge shall proceed no further with the case. The filing of the affidavit deprives him of further jurisdiction in the case.*

Mr. Cox of Indiana. But the gentleman says in his amendment that every affidavit shall set forth the reasons why. These are mental reasons and exist in the mind of the individual who files the affidavit. Suppose the affidavit sets out certain reasons which may exist in the mind of the party making the affidavit; suppose the judge to whom the affidavit is submitted says that it is not a statutory reason? In other words, *does it not leave it to the discretion of the judge?*

Mr. CULLOP. *No; it expressly provides that the judge shall proceed no further. If this affidavit is to be reviewed, it would be by the judge who is called in to succeed him.* It does not say that he shall state the facts, but the reasons for the belief that he has that the judge is biased or prejudiced in the case.[4]

Now, this amendment is very essential, in my judgment, for the protection of the

[4] As subsequently amended, the statute requires the affidavit to contain a statement of both the facts and the reasons for the belief that the judge is biased or prejudiced.

courts from criticism. As the matter now stands, a litigant in court has no recourse for relief from the trial judge, but he must submit his case, sometimes feeling, as he may, that the judge is biased and prejudiced and not qualified to sit in the case, but he has no relief whatever. That has provoked, and will continue to provoke as long as the law stands as now, criticism on the court; some of it may be just, some of it may be unjust.

This amendment seeks to remove from the court that criticism, that parties may have relief from judges in whom they have not confidence in their impartiality and freedom from prejudice, so that others may be called to hear and determine the case and avoid the criticism that now exists on the part of litigants in courts in many instances. [Italics supplied.]

Thus, it is clear from the foregoing history that Congress intended Section 21 to confer upon every litigant in the federal courts the right to demand one change of venue in every case when he and his counsel were willing to file an affidavit stating "the facts and the reasons for the belief * * * that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit." Such a statute, as certain members of Congress pointed out, may be subject to some abuse. However, after weighing the advantages and disadvantages, Congress never-

theless passed the statute in its present mandatory form, apparently believing that the federal judiciary should be above suspicion even though the statute might be occasionally invoked by a disgruntled litigant or an unscrupulous lawyer in a spirit of personal vindictiveness. Since Congress made the choice of policy, it is not for the courts to rewrite the statute. Furthermore, the feared abuses are more imaginary than real. A litigant who makes false accusations may be indicted for perjury and a lawyer who certifies that an affidavit is made "in good faith" when it contains purely frivolous reasons for the "belief" that a judge is prejudiced would be subject to disbarment. The statute permits only one such affidavit to be filed in a particular case and the litigant has no voice in the selection of the substitute judge.

In the leading case interpreting Section 21, *Berger* v. *United States,* 255 U. S. 22,[5] this Court held that the functions of the judge to whom an affidavit of prejudice is submitted are extremely narrow.[6] The Court declared (pp. 35–36):

> We are of opinion, therefore, that an affidavit upon information and belief satisfies the section and that upon its filing, *if it show the objectionable inclination or dis-*

[5] The *Berger* case is not cited in the petition for certiorari.

[6] *Lewis* v. *United States*, 14 F. (2d) 369 (C. C. A. 8); *Morris* v. *United States*, 26 F. (2d) 444 (C. C. A. 8), certiorari denied, 278 U. S. 587, affirmed on other points, 279 U. S. 63.

position of the judge, which we have said is an essential condition, *it is his duty to "proceed no further"* in the case. And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside? And any serious delay of trial is avoided by the requirement that the affidavit must be filed not less than ten days before the commencement of the term.

Our interpretation of section 21 has therefore no deterring consequences, and *we cannot relieve from its imperative conditions upon a dread or prophecy that they may be abusively used.* They can only be so used by making a false affidavit; and a charge of, and the penalties of, perjury restrain from that—perjury in him who makes the affidavit, connivance therein of counsel thereby subjecting him to disbarment. And upon what inducement and for what achievement? No other than trying the case by one judge rather than another, neither party nor counsel having voice or influence in the designation of that other; and the section in its care permits but "one such affidavit."

But if we concede, out of deference to judgments that we respect, a foundation for the dread, a possibility to the prophecy, *we must conclude Congress was aware of them and considered that there were countervail-*

ing benefits. At any rate we can only deal with the act as it is expressed and enforce it according to its expressions. Nor is it our function to approve or disapprove it; but we may say that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any "bias or prejudice" that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. *Its explicit declaration is that, upon the making and filing of the affidavit, the judge against whom it is directed "shall proceed no further therein, but another judge shall be designated* in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter." And the reason is easy to divine. To commit to the judge a decision upon the truth of the facts gives chance for the evil against which the section is directed. *The remedy by appeal is inadequate.* It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient. [Italics supplied.]

The *Berger* case notes that the affidavit "must show the objectionable inclination or disposition of the judge." That requirement is plainly met here. And the *Berger* case also indicates that an affidavit "must be based upon something other than rulings in the case" (255 U. S. at 31)[7] But in the instant case the affidavit was not based on petitioner's judicial rulings but on his general attitude and conduct in and out of the courtroom. Certainly the remarks made to Government counsel in a corridor outside the courtroom (R. 10) cannot be regarded as a judicial ruling.

The cases on which petitioner relies (Pet. 10–13) create no conflict. This statute was not involved in *National Labor Relations Board* v. *Baldwin Locomotive Works,* 128 F. (2d) 39 (C. C. A. 3) or *Walker* v. *United States,* 116 F. (2d) 458 (C. C. A. 9). In *Price* v. *Johnston,* 125 F. (2d) 806 (C. C. A. 9), certiorari denied, 316 U. S. 677, the allegation in the affidavit that the trial judge was affiliated with a bank in the vicinity of the bank for the robbery of which defendant was indicted was of course held legally insufficient, since it did not indicate any "objectionable inclination or disposition of the judge" toward the accused. And the other cases merely hold, in accord with the *Berger* case, that allegedly hostile rulings made in the same case afford insufficient

[7] *Ex parte American Steel Barrel Co.*, 230 U. S. 35 is explained in the *Berger* case as standing merely for this proposition.

grounds for the removal of the judge,[8] and that judicial rulings made by the same judge in similar cases actually disclosed no personal bias or prejudice against the affiant.[9]

There would appear to be no merit in petitioner's assertion (Pet. 8, 9) that the affidavits fail to show personal bias in favor of the landowners or against the United States. Petitioner's loyalty to the United States as a nation is not incompatible with prejudice against the United States as a litigant, or in favor of its adversary, when the Government is a particular type of litigant. The construction which petitioner would give to the statute would make it impossible for the Government to invoke its provisions—at least in the absence of treasonable misconduct by a district judge. It was the intention of Congress that any litigant, private or governmental, should be protected by the provisions of Section 21, for a provision in the original bill excluding cases brought by the Govern-

[8] *Refior* v. *Lansing Drop Forge Co.*, 124 F. (2d) 440 (C. C. A. 6), certiorari denied, 316 U. S. 671; *Scott* v. *Beams*, 122 F. (2d) 777 (C. C. A. 10), certiorari denied, 315 U. S. 809; *Ryan* v. *United States*, 99 F. (2d) 864 (C. C. A. 8), certiorari denied, 306 U. S. 635; *Minnesota & Ontario Paper Co.* v. *Molyneaux*, 70 F. (2d) 545 (C. C. A. 8); *Morse* v. *Lewis*, 54 F. (2d) 1027 (C. C. A. 4), certiorari denied, 286 U. S. 557; *Craven* v. *United States*, 22 F. (2d) 605 (C. C. A. 1), certiorari denied, 276 U. S. 627.

[9] *Ryan* v. *United States*, 99 F. (2d) 864 (C. C. A. 8), certiorari denied, 306 U. S. 635; *Sacramento Suburban Fruit Lands Co.* v. *Tatham*, 40 F. (2d) 894 (C. C. A. 9), certiorari denied, 282 U. S. 874.

ment was deleted from the statute as it was finally passed. See 46 Cong. Rec. 306. Section 21 has on occasion been invoked by the United States in unreported cases. See 20 St. Louis L. Rev. 321, 329 (1935). Because the United States can only act through agents, there is nothing inherently absurd and no connotation of treason in an affidavit alleging personal bias in favor of a landowner and against the Government.

And the fact that the United States can only act through agents is also a complete answer to petitioner's objection (Pet. 9, 12) that an affidavit signed by counsel rather than by the party litigant is insufficient. The special attorneys of the Department of Justice handling condemnation cases in Kansas were authorized by the Attorney General to file the affidavits in question on behalf of the United States (R. 46A). They were, for the purpose of signing those affidavits, the United States. And as counsel for the Government, they further certified that the affidavits were filed in good faith. In other words, they were acting in a dual capacity.

Nor can it be said that the affidavits were not timely (Pet. 8, 12–13). The statute requires such affidavits to be filed "not less than ten days before the beginning of the term of the court, or good cause * * * shown for the failure to file it within such time." The happenings relied upon in the affidavits to support the claim of bias and prejudice did not occur until October 1942. This surely

constituted "good cause" for not having filed the affidavits ten days before the commencement of the May term. As soon as the trial court's bias and prejudice became evident, the field attorneys promptly requested and obtained leave from the Attorney General to file the affidavits. The affidavits were filed on October 30, 1942, ten days before the cases were to be heard, and were therefore timely.

2. Petitioner's second major contention (Pet. 8, 12) that the facts stated in the Government's petition for mandamus did not justify the issuance of the writ is also without merit. Petitioner, of course, recognizes that the circuit courts of appeals may under exceptional circumstances issue writs of mandamus in aid of their appellate jurisdiction, and that this power exists even before the appellate court obtains actual jurisdiction of the case. Section 262 of the Judicial Code (28 U. S. C. 377); *McClellan* v. *Carland,* 217 U. S. 268, 279–280; *United States* v. *Mayer,* 235 U. S. 55, 65–66; *Henderson Tire and Rubber Co.* v. *Reeves,* 14 F. (2d) 903, 905 (C. C. A. 8), certiorari denied, 273 U. S. 744. But he denies that the Government's petition disclosed facts sufficiently exceptional to justify the writ in this instance (Pet. 8, 12).

In this case the petitioner was under a statutory duty to "proceed no further." Authority to hear the case was vested in such other judge as the senior circuit judge might designate. 28

U. S. C., §§ 21, 27. Mandamus is a customary remedy issued to prevent trial before a judge precluded by statute from exercising jurisdiction.

The ordinary rule that mandamus will not lie where there is a remedy by appeal does not bar issuance of the writ in this type of situation. The object of Section 21 was to prevent a party from being compelled to try his case before a judge alleged to be biased. The important public policy embodied in this provision would be defeated if a party were required, after a judge had refused to recuse himself, to proceed to trial before that judge and test the validity of the refusal on a subsequent appeal. In an analogous situation, this Court has permitted the use of mandamus to prevent a single judge from exercising jurisdiction where three judges are required by statute (*Ex parte Bransford,* 310 U. S. 354), even though the failure of the judge to call in two additional judges could be corrected after trial on the merits before him and appeal to a circuit court of appeals (cf. *Query* v. *United States,* 316 U. S. 486). In that situation as in this, the public interest safeguarded by the statute depriving the judge of authority would be frustrated if the case were required to proceed before him.[10] Cf. *Ex parte Collins,* 277 U. S. 565, 569.

[10] In this connection, see the remarks of this Court in *Berger* v. *United States,* quoted *supra* p. 17. As the three-judge court cases show, the fact that the district judge exercised his judgment in the first instance does not preclude mandamus.

The record discloses (R. 3–4, 47–48) that a great number of condemnation cases were pending in Kansas, involving large amounts of money and numerous landowners, that if these cases were tried before petitioner and the affidavits of bias and prejudice were subsequently sustained on appeal, the retrial of all cases heard in the interim would result in a multiplicity of appeals and a needless expenditure of time and money. Since the case at bar is the kind of case in which mandamus may properly issue, such factors may be considered by the court called upon to grant the writ.

CONCLUSION

The decision of the circuit court of appeals is in accord with the applicable decisions of this Court and raises no new questions of substance. There is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
VERNON L. WILKINSON,
S. BILLINGSLEY HILL,
WALTER J. CUMMINGS, JR.,
Attorneys.

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